

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DALLAS KILPATRIC

Claimant

VS.

BONANZA, INC.

Respondent

AND

CONTINENTAL WESTERN INSURANCE CO.

Insurance Carrier

Docket No. 253,097

ORDER

Respondent and its insurance carrier appeal from a preliminary hearing Order entered by Administrative Law Judge John D. Clark on July 18, 2000.

ISSUES

1. Did the Administrative Law Judge exceed his jurisdiction and deny respondent due process of law by ordering temporary total disability benefits when temporary total disability benefits were not requested in the Notice of Intent letter claimant sent pursuant to K.S.A. 44-534a?
2. Did the Administrative Law Judge exceed his jurisdiction by ordering preliminary benefits when claimant's injury did not arise out of and in the course of his employment with respondent but arose, instead, from his subsequent and current employment with Sears?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds and concludes the order for temporary total disability benefits should be reversed because claimant made no demand for these benefits in its Notice of Intent, but the Board concludes the order for medical treatment should be affirmed.

Findings of Fact

1. The Board finds that the injury for which claimant currently needs medical treatment did arise out of and in the course of claimant's employment with respondent, not his later employment at Sears or other activities.

On January 11, 2000, claimant injured his back while lowering a cement block while working for respondent. Claimant went home that day and respondent sent him to Minor Emergency the next day. A week later respondent sent him to Dr. Robert L. Eyster. Dr. Eyster ordered an MRI. The MRI revealed a bulging disc but claimant had a negative straight leg raising test and no reflex, motor or sensory changes. As of March 13, 2000, Dr. Eyster rated claimant's impairment as 2 percent, gave restrictions against greater than 75 pound single lift, 35 pound repetitive lift, and recommended claimant use excellent back techniques. Dr. Eyster's notes from March 13, 2000, indicate claimant was to be rechecked if symptoms increased in the future.

Respondent had no employment that would accommodate Dr. Eyster's restrictions and claimant made application for additional medical treatment and temporary total disability benefits. The first preliminary hearing was held in this case on April 6, 2000. The ALJ ordered respondent to pay temporary total disability benefits from February 11, 2000, to March 13, 2000, the date Dr. Eyster released claimant. The ALJ also ordered an IME with Dr. Philip R. Mills to determine whether claimant needed further treatment. In a letter dated April 24, 2000, Dr. Mills reported the results of his examination and stated his conclusion that claimant had reached maximum medical improvement. He rated the impairment as 5 percent of the body and gave restrictions. He recommended claimant avoid repetitious or prolonged forward flexion, avoid twist/bend positions, lift no more than 35 pounds on an occasional basis, and be able to change positions as needed. He recommended claimant be on a walking and/or swimming program but otherwise recommended no further treatment. Dr. Mills' diagnosis was L4-5 central discopathy.

After seeing Dr. Mills, claimant continued to have pain. On May 11, 2000, claimant went on his own to Dr. C. Reiff Brown. Dr. Brown diagnosed degenerative disc disease at L4-5 aggravated by the work injury. Dr. Brown suggested claimant would benefit from a progressive rehabilitative program for the low back. He recommended anti-inflammatory medications, possibly a mild non-narcotic analgesic, and possibly steroid injections. He also rated claimant's impairment and gave restrictions.

In mid-to-late May 2000, claimant began working a new job at Sears. Claimant described his job at Sears as helping customers and selling tires. He did not do any lifting. Claimant testified that nothing in the work at Sears was making his back worse. Nevertheless, claimant woke up one morning and his legs were numb. Claimant subsequently had a problem with the numbness working at Sears. Because of this, he left work at Sears in June 2000.

The record also shows claimant had earlier done some painting with and for a friend. Nothing in the record suggests claimant injured himself or even aggravated his injuries while painting.

Claimant returned on his own to Dr. Eyster June 13, 2000. Dr. Eyster's notes state:

The patient appears to have bulged a disc that we originally treated. I am going to try an epidural to get it under control. We will send him to therapy for traction and modalities.

The Board agrees with and affirms the conclusion that the injury of January 11, 2000, is the cause of claimant's problems. The evidence does not indicate claimant suffered any new injury while working at Sears or painting for his friend.

2. The Notice of Intent for this preliminary hearing did not state claimant was asking for temporary total disability benefits.

After Dr. Mills concluded claimant had reached maximum medical improvement, respondent denied claimant's request for additional medical treatment. Claimant filed an Application for Preliminary Hearing. The initial Notice of Intent letter, dated June 12, 2000, the day before claimant saw Dr. Eyster, asks for referral back to Dr. Eyster or Dr. Mills to find out what is happening medically.

On June 16, 2000, claimant sent a second Notice of Intent. This Notice attached Dr. Eyster's notes and demanded the treatment recommended by Dr. Eyster. The letter, in fact, requests the "surgery as recommended by Dr. Eyster." Although the June 12 letter mentioned claimant was not working, neither the June 12 nor the June 16 Notice of Intent letters requested payment of temporary total disability benefits.

Conclusions of Law

1. Based on the Board's finding that claimant's current need for medical treatment is caused by his January 11, 2000 injury and the Board finding that no intervening injury is established, the Board agrees with and affirms the order for medical treatment with Dr. Eyster as the authorized treating physician.

2. The order for temporary total disability benefits exceeded the jurisdiction of the Administrative Law Judge because claimant's Notice of Intent did not state claimant was seeking temporary total disability benefits. *Kane v. Westwood Animal Hospital*, WCAB Docket No. 204,483 (May 1997).

WHEREFORE, it is the finding, decision, and order of the Appeals Board that respondent should be, and is hereby, ordered to provide claimant with medical treatment with Dr. Eyster as the authorized treating physician. Claimant's request for temporary total disability benefits should be, and is hereby, denied.

IT IS SO ORDERED.

Dated this ____ day of October 2000.

BOARD MEMBER

c: Stephen J. Jones, Wichita, KS
Mark A. Buck, Topeka, KS
Nathan D. Burghart, Topeka, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director